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| /v2451/blackwell/journals/raju_v26_i1/raju_12005 |                            |
| Journal Code: RAJU                               | Proofreader: Mony          |
| Article No: RAJU12005                            | Delivery date: 19 Dec 2012 |
| Page Extent: 23                                  |                            |

Ratio Juris. Vol. 26 No. 1 March 2013 (111–133)

# THE NOTEBOOK CORNER

*I am pleased to have in this “Notebook Corner” an article by Thomas Mautner discussing the peculiar development of the concept of “right.” Also, Jan Wolenski reviews Gerald Postema’s Volume 11 of A Treatise of Legal Philosophy and General Jurisprudence, and Postema replies.*

E.P.

## How Rights Became “Subjective”

THOMAS MAUTNER\*

*Abstract.* What is commonly called a right has since about 1980 increasingly come to be called a subjective right. In this paper the origin and rise of this solecism is investigated. Its use can result in a lack of clarity and even confusion. Some aspects of rights-concepts and their history are also discussed. A brief postscript introduces Leibniz’s Razor.

*Subjective rights, together with unmarried bachelors and female vixens, form a merry threesome of redundant pleonasms—except that this sentence now contains four. Each of them contains an expletive that ought to be deleted.*

Rights cannot but be subjective. They cannot exist unless someone has them. So, necessarily, rights cannot but be subjective and no rights are non-subjective. Also necessarily, all bachelors are unmarried, all vixens are female, and all pleonasms are redundant. As a formidable lady exclaimed

\* I am profoundly grateful to all those who showed kindness and expertise and patience by generously giving their time to provide much-needed information and advice on drafts of this paper: Robert Barnes, James Grieve, Doug Kelly, John Kilcullen, Alejandra Mancilla, Peter Röper, Anna Wierzbicka, Janet Wilson, all of them in Canberra, Brenda Almond (Sussex), Felicity Baker (London), Kai Børge Hansen (Uppsala), Hans Helander (Uppsala), Lawrence Lerner (Sussex), Lindis Masterman (Melbourne), Markus Stepanians (Aachen), Brian Tierney (Cornell University).

exasperatedly: “I could never have used the term intrinsic essence—for what is an essence if it is not intrinsic?” (Seth 1993, 404). So *subjective right* is a solecism. The simple “right” is enough.<sup>1</sup>

The fact that this solecism has appeared with increasing frequency over the last few decades and that it is a source of confusion gave the impulse to the present investigation, the result of which is an intriguing story of its origin, its past and its recent spread.

## 1. How *Ius* Became Subjective

Since the end of the 1970s, the expression “subjective right” has appeared with increasing frequency in writings dealing with problems in, or the history of, moral, legal, political and social philosophy. Before then, it was hardly ever encountered in such writings. It emerged in certain recent scholarly investigations of the rights-concepts used by mediaeval and early-modern authors such as Aquinas, Ockham, Gerson, Suárez, Grotius and many others. Their works were almost without exception in Latin and the key term signifying a right was *ius* (recommended pronunciation: like the noun “use”).

It was always well understood that *ius* was polysemous (Justinian, *Digest*, 1.1.11: “*Ius pluribus modis dicitur*”). As noted by Brian Tierney, a leading authority in this field of inquiry, some mediaeval authors vied with each other in their efforts to discern different meanings (Tierney 1997, 40). One of them, Johannes Monachus in 1310 jestingly even included *ius* in the sense of broth, as if this homonymy (a relation between *two* words) was yet another equivocation. The joke, incidentally, was already to be found in Plautus.

An important distinction was that between *ius* in the sense of *lex* or *complexus legum* (a law, or the Law, i.e. a system of norms) and *ius* in the sense of *potestas* or *facultas* (power or ability or capacity; see Suárez 1973, 2.17.2). In the latter sense, but not in the former, a *ius* was something that a rational agent has, and in virtue of which the agent can do or may do certain things, or in virtue of which other rational agents can or cannot or must or must not do certain things. Briefly, *ius* in the former sense is a law or a system of law, but in the latter sense it is a right.

A salient difference between these two concepts of *ius* is that rights have bearers, and laws and the Law do not. A right belongs to someone or something: a person, an individual, a body corporate—it belongs to a subject.

The core meaning of *ius* in ancient Rome was roughly what we would think of as “the Law.” It is a system in virtue of which actions are lawful or unlawful, with sanctions attached. Other terms with meanings of a

<sup>1</sup> This is not to say that every occurrence of a pleonasm is a solecism.

similar character are *language* and *custom*. Like *ius*, such terms do not designate something that any particular individual possesses and is in a position to control or decide upon. But the *ius* of the tribe could in appropriate circumstances empower an individual. A person could become king *iure* by a decision of the people and ratification by the senate. But in the absence of this, Tarquin had no *ius regni* (right to be king) other than brute force (Livy, *Ab urbe condita*, 1.49.3)—that is, he had none. *Ius regni* is determined by the Law.

Different from this was a later conception: by sheer usurpation or by some formality, a king or an emperor could come to have all of *ius* as his own. This would generate a new concept of *ius*. The Law would now belong to the sovereign—it would be his. *Ius* could then be understood in the sense of jurisdiction.<sup>2</sup> The sovereign would be above the law and have full power to determine what is lawful.

The attribution of (normative) power to a person in this way engendered a distinctively “modern” and new sense of *ius*. When combined with ancient, especially Stoic, ideas of natural freedom and equality, it follows that in the state of nature every individual is a sovereign. The creative faculty, attributed to the emperor or the king, is no longer monopolized. Within his realm, every individual can, by means of an act of will, bring obligations into being (see Hägerström 1965, 82–4). On agreeing with others to become a citizen, the individual in the state of nature surrenders parts of his natural sovereignty—though not all of it, according to most writers on natural law.

What has now been outlined points to a plausible explanation of how *ius*, the Law, could come to be attributed to individuals and in that sense be subjective. So when it comes to terminology, one might tentatively suppose that in the old texts the impersonal conception of the Law could be styled *ius* understood *objective* (objectively) and the personal one of a right as something that a person has, a power to create (or extinguish) obligations, would be styled *ius* understood *subjective* (subjectively). One could, further, tentatively suppose that present-day scholars, immersing themselves in these texts and becoming influenced by them, would have allowed these Latin expressions to immigrate and be assimilated, in keeping with the entrenched spirit of hospitality characteristic of the English language. This would explain how the solecism emerged.

But these tentative hypotheses, designed to explain how *subjective* might have come to qualify *right*, are untenable. Mediaeval authors (Lullus, Scotus, Ockham, Nicholas of Cusa et al.) did use the non-classical adjectives *subiectivus* and *obiectivus* and their cognates in other contexts, but neither they nor later early-modern authors use those words to distinguish the two senses of *ius*—indeed, they could not. Those adjectives (and cognates) did

<sup>2</sup> Downer 1972, 320 indicates places in the text where *ius* has this sense.

not then have the meaning that we now assign to them, and could therefore not have been used to mark the difference between rights and laws. From the early scholastics up to the mid-seventeenth century when a change was underway, an *obiectum* was in the mind, and a *subiectum* was a bearer of properties and in that capacity a part of the real world out there (see Sainati 2006; Guzzo and Mathieu 2006; Lalande 1988; Kible 1998). As late as 1686, " 'objectively' was used to mean 'in the mind' and not 'in reality' " (Bayle, 2005, 235; cf. also editor's [John Kilcullen] note at 578). Almost four centuries earlier, Ockham *denied* the reality of universals by insisting that they have objective existence only (Guzmán 2003, n. 103):

## 2. "*Ius*" Said to Have a Subjective Sense

So, when present-day scholars who have immersed themselves in these mediaeval and early-modern Latin works combine *subjective* and *right*, it cannot be due to an influence from a corresponding Latin combination in those works. It is of interest to establish when that combination first emerged. Early occurrences can be found in Gottfried Achenwall's *Ius naturae* and his shorter *Prolegomena iuris naturalis*, both from the mid-1750s, with many later editions. He wrote:

A person's physical faculty, insofar as it is not contrary to any moral law, is a moral faculty, and, in a word, a (moral) *ius* taken broadly and subjectively or as an attribute of a person. (Achenwall 1781a, 14)<sup>3</sup>

A precursor of those two works was *Elementa iuris naturae* 1750, co-authored with his colleague in Göttingen, Johann Stephan Pütter. This, incidentally, was rare indeed, as the authors note in their preface. Their explanation was that in this discipline philosophers hardly ever agreed. In this work, the expression was introduced as follows: "The moral faculty to coerce another person is called *ius* understood subjectively, as a quality of a person" (Pütter and Achenwall 1750, 47).<sup>4</sup>

This earlier formulation is too narrow and does not cover the authors' intended sense. They cannot have believed that all rights we have are rights to coerce others. What they meant is that coercive measures are permissible only in case of violation of a right properly so called. This is also how Kant's formulation, that right and the permissibility of coercion "mean the same," ought to be understood (Kant 1797, 232).<sup>5</sup> The inadequate formulation does

<sup>3</sup> The Latin original: "Facultas hominis physica, quatenus nulli legi morali adversatur, est facultas moralis, et uno verbo ius (morale) late et subiective sive pro affectione personae sumtum."

<sup>4</sup> The Latin original "Facultas moralis cogendi alterum dicitur ius subiective seu pro qualitate personae sumtum."

<sup>5</sup> The German original: "Recht und Befugnis zu zwingen bedeuten also einerlei." This should not be taken too literally: cf. Kant 1797, 231.

not reappear in Achenwall's later, revised, statement, which is inadequate for a different reason, since it explicitly defines a right as a *physical* faculty (to act, or possess or receive). This would make one's rights depend on what one is physically able to do, have or receive, and does not correctly explain his—and our—concept of a right.

Still, the subject/object terminology was now used to distinguish two senses of the word *ius*. *Ius* can be taken in two different ways, subjectively or objectively: *ius subiective sumtum* and *ius obiective sumtum*. (In classical Latin, the preferred spelling was *sumptum*.)

Many other writers at the time, following Grotius, noted the same distinction, though not in these terms. For example, "the word *ius* may be taken to mean either a law or an ability to act (or, as Grotius says, an attribute of a person)" (Fleischer 1730, 1.5.1).<sup>6</sup> Similar Grotius-inspired statements were common (Pufendorf 1684, 1.1.20; Thomasius 1720, 1.1.82; Thomasius 1718, 1.5.1; Gundling 1715, §57, §58 in a later edition).<sup>7</sup>

Grotius's definition (Grotius 1625, 1.1.4.–1.1.5) was indeed the main point of reference in the literature. He recognised three senses of *ius*. In the sense of a right or power, the one relevant here, a *ius* was a *qualitas moralis personae competens ad aliquid iuste habendum vel agendum*—a moral quality belonging to a person to have or do something lawfully.

As for the translation of this clause, it is to be noted that *competens* means belonging to. There should be no comma after the dative *personae*. The constructions *facultas ad*, *aptitudo ad* were in use, as the following quotations show, and by analogy, *qualitas ad* (used by Grotius to cover both) would be easily understood. "Lawfully" preserves the ambiguity of *iuste*. It can mean either validly (with legal effect) or justly (rightly, not contrary to law). The former refers to what one *can* do, the latter to what one *may* do. Grotius was aware of the distinction.<sup>8</sup> Many eighteenth-century authors who adopted his definition were not. They inclined towards the latter sense and failed clearly to distinguish powers from permissions.

For Grotius, a *ius proprie aut stricte dictum*—a *ius* properly so called—is a *qualitas moralis perfecta*, and *facultas nobis dicitur*—a perfect moral quality which we call a faculty (ability, power, capacity). Grotius, using the very same words as Suárez (see Suárez 1973, 1.2.5) —*proprie, stricte, facultas moralis*—distinguished this perfect moral quality, properly called a *facultas*, from worth or merit (*αξία*). Pufendorf and most later writers called it imperfect right. Coercive sanctions are attached only to rights properly so called, i.e. perfect rights.

<sup>6</sup> The Latin original: "Vocabulum juris—vel pro lege, vel pro facultate agendi (sive, ut Grotius loquitur, pro attributo personae) sumatur."

<sup>7</sup> Works by a large number of other authors could be added to this list.

<sup>8</sup> "Sunt enim diversa, prohibere & irritum quid facere" (to prohibit and to declare invalid are not the same thing). (Grotius 1625, 2.5.16.1).

Grotius was by no means alone in noting that *ius* could denote something that a person has. Molina defined one sense of *ius* as a *facultas aliquid faciendi sive obtinendi*, a faculty to do or to receive something, and wrote: “Altero modo dicitur aliquis habere ius ad aliquid, non quod sit ei aliquid debitum, sed quod facultatem habeat ad aliquid” (in another sense it is said that someone has a right to something not because it is owed to him, but because he has the faculty in respect of it).<sup>9</sup> And Suárez wrote: “Ius enim interdum significat moralem facultatem ad rem aliquam” (*Ius* sometimes signifies a moral faculty in respect of a thing). (Suárez 1973, 2.17.2).

Achenwall and Pütter were not, however, the first to combine *subiectivum* and *ius* to distinguish *ius* in the sense of a right from *ius* in the sense of a law or the Law. Alejandro Guzmán, who seems to have been the first to investigate this matter (Guzmán 2003) has found the combination in works published in the late 1740s by Joachim Georg Darjes (1714–1791, Professor in Jena and later Frankfurt a.d.O.) and David Nettelblatt (1719–1791, Professor in Halle). Guzmán (2003, n. 59, 60) cites passages from Darjes *Institutiones jurisprudentiae universalis* (Darjes 1748) and mentions also *Discours über sein Natur- und Völkerrecht*, published in 1762 (not “1726”!). He also quotes Nettelblatt, *Systema elementare universae iurisprudentia naturalis* (1767; 1st ed. 1749). As for Darjes *Institutiones*, the first three editions came in 1740, 1745 and 1748.<sup>10</sup> Guzmán locates the passages he cites to the 1745 edition, but they seem in fact to appear for the first time in the revised “editio tertia” of 1748. Important are also his *Observationes iuris naturalis*, 2 vols, (Darjes 1751), which comment on his earlier textbook, reply to objections and provide ample guidance to the relevant literature.

The number of authors of works on natural law used in the German universities was great indeed. Those of Achenwall and Darjes were, together with Wolff’s, the ones most widely used in the period 1750–1790. Kant used Achenwall’s in his lecture course on natural law. My own sampling of early eighteenth-century authors like Buddeus, Gundling, Wolff, and Köhler has so far not revealed any earlier linking of *ius* with the adjective *subiectivum* or the adverb *subiective*. Until further notice, Darjes can claim priority.

Guzmán gives a useful survey of the radical change of meaning of *subiectum*, *obiectum* and their cognates, adverted to above, which was well under way by the late seventeenth century and for the first time, made it possible for *subiectum* and cognates to be used in this way. As he observes, there had been previous links with the noun. Leibniz had described a person who has a right (*jus*) or an obligation as a *subjectum qualitatis moralis*—a bearer of a moral quality. A *subjectum juris* is a personal being who has a right or power. Thus he writes, “Deus est subjectum juris summi in omnia”—God possesses the highest right over everything (Leibniz 1667,

<sup>9</sup> Molina, *De iustitia et jure*, 1.15–1.16. The quotation is drawn from Tierney 1997, 220.

<sup>10</sup> Darjes 1776, 22 has the incorrect dates 1740, 1743 and 1745.



2.15; 1990b, 301). In his textbook, Darjes mentions *iura* which are taken to exist in a certain subject (in *subiecto quodam*), and to be a quality of a person (3) (*qualitas personae*) (see Darjes 1745, sec. 9).

Expressions combining *ius* with the adverb *subiective* appear in a new preface that Darjes wrote for the third edition of his textbook in 1748, in reply to a radical and quite colourful attack on mainstream natural law theory by Johann Jacob Schmauss (1690–1757), Professor in Göttingen, who maintained that whatever instincts nature has implanted in us are in accord with the law of nature, to be distinguished from inclinations or aversions due to the influence from nurture, convention and positive law (Schmauss 1748). Darjes opposed this, claiming that Schmauss had overlooked, or denied, the radical difference between, for example, drinking to slake one's thirst and drinking to get drunk, or between *concubitus* and *stuprum*. Only the first in these pairs accord with nature. Some instincts and propensities are unnatural. He relied on a conception of natural tendencies, inherent in the nature of each kind of being. We have knowledge of ours in our inward experience. He explained this more fully a few years later.<sup>11</sup> First, the general concept of *ius*, with reference to a person, is: *facultas, ea, quae sibi bona sunt, agendi* (a faculty to do that which, for the agent, is good) (Darjes 1751, 2.3 also e.g. 2.6, 2.9, 3.1). Secondly, the particular concept of *ius naturae*, understood *subiective* (subjectively), is the *ius* that by nature inheres in the person. Our essence, actualised, has by nature *conatus* (strivings) or *stimuli* (promptings). These direct us to what is appropriate to our nature, or, in other words, *quod nobis bonum est* (what is good for us). *Ius naturae* in this sense he will call *ius naturae subiective sumtum* (*ius* of nature taken subjectively).

Darjes used this Aristotelian-Stoic teleological account of human nature to oppose what he saw as Schmauss's indiscriminate acceptance of natural instincts. A full account of Darjes's view on this is ruled out for reasons of space, but a strikingly similar account can be found three centuries later in Maritain (see Maritain 1961, 84–89). This may seem surprising, but the common, ultimately Aristotelian, background explains the similarity.

Darjes's account is far from clear. On the one hand, the natural *ius*, subjectively understood, is defined as something manifested in inwardly felt propensities that are part of our actualised essence. On the other hand, this *ius* is defined in the standard way, as a faculty (ability, power, capacity). Perhaps Darjes thought that it can be defined as a faculty to act in accordance with the human good. If so, his proposal could be interpreted as an alternative to Achenwall's faculty to act morally licitly, and to Grotius's faculty to act *iuste*.

<sup>11</sup> He refers to Aristotle (Aristotle, *Physics*, 2.1 and *Metaphysics*, 1.7), deplores the obscurity of Brucker's account in *Historia philosophicae*, in Brucker 1742, 1.2 sec. 2.7.8, and praises the clarity of Cudworth's in *Systema intellectuale* (see Cudworth 1733, 1115ff).

4 But along with this, Guzmán attributes to Darjes (2003, §§6–7) the view  
that the subjectivity of *ius* consists in a person’s ability to act in a manner  
which the person believes or knows to be good, and this is construed as  
an instance of the contrast between appearance and reality, between what  
is subjectively perceived and what is objectively the case.

Given the particular way in which Darjes took *ius* to be an ability to do what is  
good, but only insofar as it is understood or known [by the agent] to be good, he  
thought that for this reason it could be said that one looks at *ius* subjectively. since,  
according to this new language, to regard things as they are known or thought, is  
indeed *subiective* [subjectively] in the same sense as belief can be taken to be that  
which is for everyone what he understands it to be [...] subjectively it is true for  
me insofar as and as long as it seems so to me.[...] In contrast, the law is *ius*  
*objective sumto* insofar as it is something external to the understanding or  
conception.<sup>12</sup>

Whether such a theory of the nature of a right—implausible as it is—is  
actually in Darjes is doubtful. But a detailed analysis of this must await  
another occasion.

It appears, then, that it was by the mid-eighteenth century that the  
subjective/objective terminology was first used to distinguish *ius* in the  
objective sense of *law* or *the Law* from *ius* in the subjective sense of *a right*.

The only Latin variant—not without merit—which has come to my  
notice is one in A. van Hove (van Hove 1928, n.2). He uses adjectives to  
qualify *ius*, retains the meaning of *ius subiectivum*, but gives a new name,  
*ius normativum*, for what would otherwise be known as *ius obiectivum*,  
and reserves *ius obiectivum* for the *suum*, i.e. that which is a person’s  
own, typically including, as in Locke, life, liberty health, limb and goods,  
but not necessarily limited to these. The importance of this distinctive  
concept of one’s own is often neglected in the literature (cf. Olivecrona  
2010).

### 3. “Recht” Said to Have a Subjective Sense

Later in the eighteenth century, the vernacular was increasingly preferred  
to Latin, and in German, *Recht*, which has the same ambiguity as *ius*, could  
accordingly be understood either *im subjektiven Sinn(e)* (in a subjective

<sup>12</sup> The Spanish original: “[...] Ahora bien, puesto que la especial manera en que Darjes lo  
[i.e. *ius*] consideraba era como facultad de actuar cosas buenas, pero en cuanto se las  
entiende o sabe como buenas, por esto último estimó del caso decir que se mira subiective  
al *ius*, porque, según el nuevo lenguaje, una consideración que tome como punto de vista  
a las cosas tales cuales son conocidas o pensadas, es precisamente subiective, en el mismo  
sentido en que se considera así a la fe como lo que cada cual entiende por cual [...] subiectivamente es verdad para mí en cuanto me parece y mientras me parezca [...] La ley,  
en cambio, es *ius obiective sumto* [sic] en cuanto ella es algo externo a la comprensión o  
concepción” (Guzmán 2003, §7).



sense) or *im objektiven Sinn(e)* (in a subjective sense). (*Bedeutung* was also used, but *Sinn* has prevailed.) An alternative pair of expressions emerged later: *subjektives Recht* and *objektives Recht*. It can be taken as a harmless variant which has the virtue of brevity (four words instead of eight). When it came in, the use of Latin was in decline, so *ius subiectivum / obiectivum* would be rare. What is said here about German later applied to many other languages.

However, the shorter expressions make it sound as if the distinction was between two kinds or instances of *Recht*, rather than two senses of “*Recht*”. This is not necessarily misleading. Given certain assumptions about the nature and source of obligatory force (or “normativity”), the shorter expressions may have been so intended. To illustrate the point: assume that all law expresses the will of a sovereign authority. English law and French law would be two instances of the same feature, since the sovereign authority is not the same. It would be incorrect to say that “law” in those expressions was used in two different senses. In a similar way, the two kinds or instances of *Recht* we are discussing would differ in that one would flow from the will of an autonomous person, the other from the will of an entity external to the individual (the sovereign, the people, nature, God). This outlook found striking expression in the following statement:

In virtue of human personhood, the essence of which is self-causality and self-reflexivity, this realm, bestowed on man by the moral power of Law, becomes necessarily his own, a moral power intrinsic to himself over against others. The others are morally obliged towards him—not only towards God, or their conscience, or the legal system. He is not merely the party to whom they owe a duty, but he is the ground of their duty. This is the nature of the rights which belong to a person. (Stahl 1845, 218)<sup>13</sup>

Rights in this sense mark a realm of individual sovereignty, a conception that had come to expression in Grotius, Pufendorf, Locke and a host of writers of natural law and on politics since. To this conception pertains the view that the person is the ground of others’ obligations. In this spirit, leading authors in nineteenth-century Germany defined a right as a *Willensmacht* (a power inherent in a person’s will). What was then added, under the influence of Rousseau and Kant, was the idea of the sacredness and absolute value of personhood: unconditional respect was its due.

<sup>13</sup> The German original: “Kraft der Persönlichkeit des Menschen, deren Wesen ja Selbstursächlichkeit und Konzentrierung (Rückbeziehung) auf sich ist, wird diese Sphäre, welche ihm durch die sittliche Macht des Rechts angewiesen ist, notwendig zu seiner eignen, ihm selbst innewohnenden sittlichen Macht gegen die andern. Diese sind ihm —nicht bloss Gott, oder ihrem Gewissen oder der Rechtsordnung in Beziehung auf ihn— sittlich gebunden, er ist nicht blosser Gegenstand ihrer Pflicht, sondern Ursache derselbe. Dies ist das Recht im subjektiven Sinne oder die Rechte.”

"Human personhood is holy and inviolable."<sup>14</sup> It is the basic principle of all rights (see Ahrens 1871, 19–20).

The central place of personhood as the ultimate source of people's rights in the theories by the early nineteenth century has been well described in an article by Diethelm Klippel (1995, 287).

This way of thinking contains a "tension" that defies clear explanation: the individual's sovereign realm is granted him by the Law, and yet the same realm is also said to be intrinsic to him, flowing from his being a person with an essential claim to respect.

Still, leaving aside such theoretical frameworks, the pair of terms can be understood to distinguish senses of "*Recht*" rather than kinds of *Recht*.

It took some time for the new terminology to be fully established as part of the standard vocabulary in legal or moral theory. It is not mentioned even in the revised second edition of Krug's encyclopedia (Krug 1833, 1838). As late as 1897 Amira writes *das sog.* [= so-called] *subjektive Recht* (Amira 1897, 7).<sup>15</sup> However, "German lawyers today use *objektives Recht* to mean 'law,' and *subjektives Recht* to mean a 'right' someone has" (Byrd and Hruschka 2010, 28).

We saw that the solecism we are tracing could not have been due to present-day scholars' immersion in medieval and early-modern Latin texts, since the corresponding Latin expression did not exist. Could it have been inspired by a close engagement with eighteenth-century German *Ius naturae*, where the Latin neologism emerged, or with its continuations as *Naturrecht*, *Rechtsphilosophie* or *allgemeine Rechtslehre*? This is most unlikely. Its origin should be sought elsewhere.

#### 4. Other Languages

The equivalents to *ius* and *Recht*, with the same ambiguity, are present in most European languages. One reliable source names six Romance, six Germanic, and eight Slavic languages. Even Lithuanians and Letts have it, not to mention the Finns.<sup>16</sup> Scholars writing in those languages also began similarly to disambiguate. Examples are *droit subjectif / objectif* in French and *diritto soggettivo / oggettivo* in Italian. The same source also notes that (apart from modern Greek) English is the great exception.

At this point, a simple table may help (see Mautner 2006, *s.v.* "right"):

<sup>14</sup> The German original: "Die menschliche Persönlichkeit ist heilig und unverletzlich." In the same spirit see Dernburg 1911, I.5.33, p. 65: "The individual personality of man alone has intrinsic and ultimate worth." Cf. also Barker 1942, 15–6. Similar sentiments appear frequently in more recent literature.

<sup>15</sup> On the other hand, in the late 1800s, treatises on *subjektives Recht* announcing this in their title were not uncommon (Hölder, Jellinek, Schuppe, et al.).

<sup>16</sup> And other speakers of Uralic languages. See Gasparri and Di Lucia 2006, 2980–2981.

| English   | German   | French  | Latin   |
|---|--|---|---|
| LAW<br>in the sense of a body of law,<br>e.g., Civil Law, Roman Law,<br>Natural Law, private law,<br>the law of torts, administrative<br>law, etc.<br>A RIGHT<br>of a person, to do something or<br>to have something or to receive<br>something, etc.)<br>A LAW<br>a rule, a statute, an ordinance | <i>Recht (objektives<br/>Recht)</i><br><br><i>Recht (subjektives<br/>Recht)</i><br><br><i>Gesetz</i> | <i>droit (droit objectif)</i><br><br><i>droit (droit subjectif)</i><br><br><i>Loi</i> | <i>ius (ius obiective<br/>sumptum)</i><br><br><i>ius (ius subjective<br/>sumptum)</i><br><br><i>lex</i> |

5. English

In English, *law* cannot replace *right*. Human laws are not the same as human rights. (Except that poor translation and editorial non-intervention have allowed “law” and “subjective law” to be used instead of “right” in two major articles in a leading scholarly journal (Zarka 1999a, 1999b). Elsewhere, *subjektives Recht* has become “Law in a Subjective Sense” (see Kelsen 1960, 130; 1967, 129), although the English word “law” does not have a subjective sense.

Nor can *right* replace *law*. Consider *Roman Law*, the *law of torts*, *criminal law*, replace *law* with *right*, and note the result. Nor is a natural right the same as a natural law. Obviously, English does not need the disambiguation.

These remarks have the support of authority: neither Samuel Johnson’s dictionary of 1755, nor the OED include law *s.v.* “right, *n.*” In the 1780s, Bentham took it for granted that in English *right* does not have the sense of *law*—and regretted the fact. He noted that *law* was ambiguous and that long ago, *right* had been used like *Recht* and regretted that this was no longer the case:

In most of the European languages there are two different words for distinguishing the abstract and the concrete senses<sup>17</sup> of the word law: [lex for the concrete sense, jus for the abstract]. [...] In the Anglo-Saxon, there was the word right, answering to the German recht, for the abstract [sense] [...]. But the word right having long ago lost this sense, the modern English no longer possesses this advantage. (Bentham 2010, 16ff.)<sup>18</sup>

The foremost of Bentham’s followers, John Austin, agreed that “right” had lost the sense of Law (see Austin 1954, 285–8), but did not consider it a disadvantage. He noted that in Latin the name which signifies right as

<sup>17</sup> The two senses are discussed in Salmond 1966, 48.  
<sup>18</sup> See also Bentham 1970, 17.23.

1 meaning faculty, also signifies law: "*jus* [. . .] denoting indifferently either  
2 of these two" (Austin 1954, 287), and complained that the German writers,  
3 like Kant and many of his followers, often blurred the two meanings, and  
4 that when they distinguished *objektives* from *subjektives Recht*, they erred in  
5 taking *Recht* to signify one genus divided into "two species or sorts," in  
6 spite of the fact that "law" and "faculty" cannot be so understood.<sup>19</sup>

7 The confusion of law and right, he continued (see Austin 1954, 288), is  
8 avoided by our writers because commonly the two things denoted have  
9 these clearly different words to denote them. Austin's commitment to the  
10 theory that all moral and legal duties are commands from a superior able  
11 to enforce them made it difficult for him to make sense of the notions of  
12 the obligation-creating power of autonomous willing and of the intrinsic  
13 value of personhood.

14 Nevertheless, "right" in an objective sense is perhaps not entirely extinct.  
15 First, some inherited phrases are indeterminate between the two: e.g. "by  
16 right of nature." Secondly, although the ancient Germanic usage is absent  
17 from Samuel Johnson's dictionary in the mid-1750s, Thomas Rutherforth  
18 states at that time in his lectures on Grotius that it occurs, though "very  
19 seldom" (Rutherforth 1754, 1.24). Contrary to Bentham, Austin concedes  
20 that it appears, albeit rarely. Thirdly, deviations from correct usage occur  
21 because of foreign-language influences. Hegel's *Philosophie des Rechts*  
22 should of course be *Philosophy of Law*.<sup>20</sup> Leo Strauss's influential work about  
23 theories of natural law and political justice would, but for political devel-  
24 opments in 1930s Germany, no doubt have been published as *Naturrecht*  
25 *und Geschichte*, which indeed became the title of the later German edition  
26 (1956) of his misnamed *Natural Right and History* (1953). Maybe he rejected  
27 friendly advice, maybe none was offered. One recent author, obviously  
28 under French influence, treats *natural law* and *natural right* as fully inter-  
29 changeable.<sup>21</sup> None of the above, however, creates any need for the  
30 continental-style disambiguation.

## 31 32 6. The Rise of the Solecism

33 Austin, like Bentham, as we have seen, saw no need to adjoin *subjective* to  
34 *right*. During the next 150 years almost everyone in the human and social  
35 sciences who wrote on legal, moral or political subjects agreed.

36 It was not until about 1980 that a change set in. It is illustrated by the  
37 quotations that follow. Earlier examples are rare. The ones that follow are  
38 a minute random selection from quite a large collection. They illustrate a  
39 lexical point, so the comments on content are few and brief.

40  
41 <sup>19</sup> This is also the view of Jean Dabin: The second elements in *droit-règle* and *droit-prérogatif*  
42 do not qualify a *notion univoque* (see Dabin 1952).

43 <sup>20</sup> Ernest Barker (1934, xxii, liii) agrees.

44 <sup>21</sup> Edelstein (2009, 33, 34, 36) offers clear examples.

1. "[Sixteenth-century Thomists began to] take over the 'subjective' view of rights which had originated with Ockham and his followers [. . .]" (Skinner 1978, vol. 2, 176).
2. "[Premediaeval writings] contained no explicit sense of what we would now understand by 'a subjective right'" (Kingsbury and Roberts 1990, 31).
3. "Grotius' theory of natural or subjective rights" (Kingsbury and Roberts 1990, 51). (Here, as elsewhere, "subjective" can be omitted. The "or" is puzzling.)
4. "In the early sixteenth century, [. . .] Vitoria revived Aquinas's theory [. . .] with no mention of subjective rights" (Miller et al. 1991, 508).
5. "The new approaches to physical science, moral, religious and epistemological scepticism, the vocabulary of subjective rights" (Hampsher-Monk 1992, xii).
6. "A doctrine of what we would later call subjective rights was already [in the thirteenth century] implicit in marriage law" (Coleman 1996, 16).
7. "Subjective rights, as they would now be called" (Haakonssen 1998, 1324).
8. "Right for Grotius is entirely "subjective right" [. . .] something to be exercised (or not) at the discretion of the right-holder; it is no longer objective right, a rightful state of affairs. [. . .] In reserving the term *jus* for subjective rights, Grotius innovated" (Zuckert 1998, 141). (The statement is not correct. Grotius did not reserve the term *jus* in this way: he recognised and used different senses of the word. See in this regard Grotius 1625, 1.1.3–6 and 1.1.9).
9. "Yet, within limits we have the subjective right to do what is objectively wrong" (Zuckert 2001, 125).
10. "[In Grotius] the duty to respect the subjective rights of others becomes paramount" (Harvey 2006, 35).
11. "[W]hat present-day scholars and theorists have termed subjective rights in the sense that they are thought to inhere in each individual person by nature" (Zagorin 2009, 23). (A mistake: the rights need not be natural.)
12. "It is true that subjective rights have, historically, been associated with rights as dominium" (Waldron 2010, 229).<sup>22</sup>

The quoted statements are all recent. Many of them indicate that what they refer to has only recently come to be called "subjective right." What it was called earlier is left unexplained. It is notable that in most of them "subjective" as an adjective to "right" can simply be deleted (in some cases with slight re-phrasing) without any change of meaning. For example: "A

<sup>22</sup> In contrast, the expression does not appear in Waldron 1986.

right to do wrong" omits nothing from item 9 and is more elegant (see Waldron 1981).

What inspired this neologism? It is not needed for disambiguation. We saw earlier that it could not have been inspired by mediaeval and early-modern writings. An influence on terminology from eighteenth-century *Ius naturae* and *Naturrecht* or subsequent nineteenth-century legal or political theory is unlikely. It would have manifested itself much earlier. We have to look elsewhere.

## 8. A Theory of the Origin of Rights-Concepts

Among those who in the post-war period devoted themselves to a study of the history of moral and political thought, Michel Villey came to play quite a significant part (see Villey 1964, 1968, 1969 and many other writings). He maintained—rightly—that the historiography of rights-concepts had to look back beyond Grotius. A central thesis of his was that the modern concept of a right had its origin in the writings of William of Ockham, and that it was shaped in the course of the polemic against Pope John XXII that began in 1321, on the question of evangelical poverty.<sup>23</sup> The Franciscan position, defended by Ockham, was that having taken a vow of poverty, they had no property and nothing was their own. They *made use* of basic necessities (food, raiment, shelter) but they did not *own* anything. It was, according to Villey, in this context that the concept of property rights and other real rights came to be defined. As the possessor of a right in this sense the person is in control and decides what is lawful and unlawful, right and wrong. The characterisation of the conception of a *droit subjectif* that Villey spells out in some detail is rather similar to Stahl's, quoted above.<sup>24</sup> But his attribution of such a full-blown conception to Ockham is no doubt an anachronism. It is all the more doubtful since there is a transition in Villey's argument that may not have received sufficient critical examination in the literature. The transition is from rights of ownership or use of goods, debated in the context of Franciscan poverty, to rights of the kinds belonging to a ruler, a master, a parent, a creditor, or a free and autonomous person. It is rights of these kinds, rather than rights in things, that are central to the modern individualism that Villey went on to attack. Therefore, Ockham's disquisitions on matters of interest only to mendicant friars would hardly be relevant for the emergence of the concept of a right as a *potestas* or *facultas moralis*. When later writers on natural law

<sup>23</sup> John Kilcullen gives a clear and informative account of the background and content of the controversy: see Kilcullen 2001.

<sup>24</sup> "This kind of right which in the last analysis would be derived from the very being of the subject, his essence, his nature" (Villey 1969, 145). The French original is as follows: "[C]ette espèce de droit qui serait en dernière analyse tiré de l'être même du sujet, de son essence, de sa nature."



mentioned Ockham, it was hardly ever in relation to this, but to the voluntarism usually attributed to him. (Whether the attribution was reasonable has been disputed: "It would seem that Ockham's theory is not voluntarist." Kilcullen 2001, vol. 2, 882).

Villey had not found any "subject"-expressions before the 1660s (Leibniz), but did not raise the question why it took hundreds of years for the new conception to be so labelled. He writes that the sense of *subjektiv* in the Pandectists is inherited from the old scholastic usage and seems unaware of the change in meaning of which Guzmán's survey serves as a reminder (Villey 1969, 144–5).

As with most histories, there is an ulterior motive. Villey wanted to convey a message. We should realise, he argued, that the new conception of rights was the first step on the downhill road to modernity, individualism, egoism, and neglect of social solidarity and the common good, away from the superior conception of an overall objective and just order which was given a classical statement by Thomas Aquinas (Villey 1969, 141). The mediaeval Aristotelian synthesis of Aquinas had been the high point of philosophy, from which later scholastics such as Duns Scotus and Ockham had fallen away. The path of modern philosophy had been further downward. Hobbes, Spinoza, Gassendi, Locke, Wolff were among those who contributed to the *déformation*. Villey did not agree that, as asserted e.g. by Jacques Maritain (1961, 84), it was Grotius who began deforming the genuine idea of natural law. The decline had begun earlier.<sup>25</sup>

A sketch as brief as this cannot do full justice to Villey's account of rights-concepts and their history. Insightful expositions and criticisms are made in writings by Brian Tierney from the 1980s onward (Tierney 1997). They are a rich source of information about mediaeval thought and contain significant objections to many of Villey's theses (Tierney 1997, 13). He shows that concepts claimed to have originated with Ockham were current much earlier.

In the 1970s, Cambridge scholars with an interest in the history of moral and political thought had become acquainted with Villey's work. Important parts of his account of the origin of the concept of a right found acceptance in Quentin Skinner's *The Foundations of Modern Political Thought* (Skinner 1978) and in Richard Tuck's *Natural Rights Theories* (Tuck 1979). Since then, Villey's thought, "always interesting, sometimes idiosyncratic" has become "widely and uncritically accepted" (Tierney 1997, 14). There were earlier admirers also. Orestano wrote enthusiastically of "the important and brilliant contribution of Villey" (Orestano 1960, 3). More recently

<sup>25</sup> The same perspective has been re-affirmed by Edward Feser in his *The Last Superstition* (Feser 2008). Anthony Kenny's review (Kenny 2011) describes and criticises his view of an epochal decline, from the high point reached in the medieval Aristotelian synthesis of St Thomas Aquinas, via a sequence of intellectual disasters, to the unhealthy philosophical condition of our times.

Yves-Charles Zarka mentions with approval the "classic" works of Lagarde and Villey (Zarka 1999a, 16).

## 9. Aetiology and Diffusion

Up to this point, we have considered, first, how *ius* was conceived as a power, *potestas*, an attribute of a subject, i.e. a person, and secondly, how, centuries later "*ius*" first could be said to be *subiective sumptum* and *ius*, soon after, to be *subiectivum*. It is now time to turn to the final question: how did the superfluous *subjective* come to be added to *right*?

The answer to that question is simple: *Villey wrote in French!*

It was natural, indeed necessary, for Villey to write *droit subjectif*. What is astonishing is that the adjective was not cut adrift and left to perish in the waves when his ideas crossed the Channel and found a welcome in Cambridge. Left behind on the quay, however, and not conveyed on "that one and twenty miles sailing" was the conservative message of decline that Villey associated with his historical analysis. Skinner put *subjective* within inverted commas in some places, but omitted them elsewhere,<sup>26</sup> and in Tuck's book *subjective right* appeared many times, though mainly (or only?) in the sections which deal with Villey's views. Because of the influence of their works, of which, with respect to this particular lexical development, the latter has probably played a greater part, it is not only Villey's debatable theory that has gained wide acceptance, but also the pleonastic expression which, coined somewhat carelessly, is an unidiomatic calque.

It is puzzling that this new solecism has continued to spread widely, albeit not uniformly. "Academic life is not marked only by fashion but also by its uneven diffusion" (Hall 2010, 128). Could the wide uptake in part be due to a fear of appearing to be out of touch, a readiness "deferentially to submit to the fashion at present prevailing"? (Thackeray 2001, 747).

No such suspicion could possibly be entertained about Tierney. It is therefore strange indeed that he would use the redundant expression and even more mystifying that it appears frequently only in chapters 1, 5, 9, and 11 and sparingly or not at all in chapter 3, 4, 6, 7, 8 and 10 of *The Idea of Natural Rights*, even though they all deal with the same range of subjects. Particularly baffling is the later insertion of "subjective" into the well-formulated sentence "The concept of individual rights has become central to our political discourse [. . .]" (Tierney 1988, 5).<sup>27</sup>

It seems, then, that this meme (*sit venia verbo*), which has proliferated in the recent literature on moral and political thought and its history, began with the Cambridge reception of Villey at the end of the 1970s.

<sup>26</sup> Likewise Geoffrey Samuel in Samuel 1989.

<sup>27</sup> The insertion is in the revised version which became Chapter 1 of Tierney 1997.

In some cases, however, a direct influence from another language will be discernible, especially when an author whose mother tongue is not English is let down by anglophone helpers and editors. Also, beyond moral and political thought and its history, in disciplines such as international law and international private law, many instances of the pleonasm appear in reports, papers and treatises, be they poorly translated or of local origin. The same applies to what is produced by non-governmental organisations, transnational enterprises and other international bodies. Christian Tams's apt comment on this will be quoted below.

## 10. Harmful Consequences

Many lexical aberrations are only that. The reason why the one here exposed requires special attention is that its use creates obscurity and confusion and is spreading into textbooks.

In French, and similarly in other continental languages, *droit subjectif/droit objectif* are technical terms. They are unknown even to persons whose command of the language is unquestionable but who are unfamiliar with the more specialised literature on law and justice in which these expressions are explained. In contrast, although *subjective right* enters discourse as a technical term,<sup>28</sup> it is explained inadequately or left unexplained.

If it is left unexplained, the innocent reader will be led to believe that he is ignorant of a concept that he ought to be familiar with, but he will assume that "subjective" adds something to "right". Failure is guaranteed, since a "subjective right" is nothing but a *subjektives Recht*, *droit subjectif*, etc., that is—a right.

Some authors do, however, define the expression. Their definitions will let "subjective" add something to "right" and, again for the same reason, failure is guaranteed. It is like letting "female" add something to "vixen."

One attempt is by defining subjective rights as those which belong to a particular individual. "Such rights are often therefore referred to as 'subjective rights', meaning that they apply to particular subjects" (McKinnell 2010). The implied contrast is with rights that belong to authorities or corporations or other non-individuals. But in the literature, so-called subjective rights are, like rights, commonly attributed also to the latter. For example: "[. . .] giving students, parents, and relative authorities subjective rights in shaping religious instruction" (Dromgold and Schneider 2010). See also the statement in Tams 2005, quoted below.

Given the terminological/conceptual fog surrounding this ill-defined expression, it is not surprising that an author can come to endorse both of these contrary standpoints. On the one hand he writes of "the subjective

<sup>28</sup> Collins Wordbanks Online: English (August 2011) confirms this strongly.

rights of government [...] and the subjective rights of the individual", and on the other hand he gives the impression that they belong to individuals only: "The classical liberal model [...] conceives these to be rights vested in individuals (ie subjective rights) against government" and "Subjective rights are rights that are possessed by an individual in right of [*sic*] their status as a person [...]" (Loughlin 2010, 406, 369, 367).

Another attempt is this:

A subjective right is an individual's good-faith belief about his rights; this belief gives him title to coerce others to keep off his property or to allow him bodily inviolability. But it does not yet place other people under a correlative duty. (Stilz 2009, 47–8)

This means that a "subjective right" is not something that a subject *has*, but something which a subject *believes that he has*. This has unfortunate implications. A person who is unaware of the fact that he is an inheritor would have no "subjective right" to the inheritance. If, on the other hand, someone wrongly believes that he is an inheritor, his belief would give him title to coerce others.

An expression like "subjective right" naturally calls for a contrasting expression. The obvious candidate is "objective right." Some authors avoid using the latter, and some who do use it wisely refrain from explaining it. Others are braver. In their struggle to make sense of this contrast between "subjective right" and "objective right," they propose that "right" in the first is a noun, and in the second an adjective, and that this is made explicit by the words "subjective" and "objective" (see Edmundson 2004, 8–9; Ivison 2007, 7ff.; Vincent 2010, 13, 33, 56)! This evidently will not do. For one thing, as an adjective, "right" has to be qualified by an adverb. To add to the confusion, it is also suggested that "the 'object' in objective right is, if anything, the global object of moral assessment or prescription" (Edmundson 2004, 9).

## 11. Reactions and Protests

Material examined for this paper suggests that some authors feel uncomfortable with the neologism, and if asked to explain might feel slightly embarrassed. When in November 2010, a scholar (no personal acquaintance) circulated a paper to be presented at a seminar, an inquiry about it received a gracious answer by e-mail. It reads in part:

You are quite right to pull me up about subjective rights: the term is most unsatisfactory, in part, I suspect, because it is wrenched from its original context in nineteenth-century German political thinking (but I read German only very slowly and haven't yet investigated this important point). Most Anglo-American writers at some point use the term, but few give any clear account of the criterion by which they distinguish "objective" from "subjective."

Explicit misgivings about this solecism are rare. Martin Golding writes, "I do not particularly care for this terminology" (Golding 1984, 126). Christian Tams's statement (truncated for lack of space) is the only more fully articulated protest found so far:

Some of the discussion about [subjective rights] seems to be based on the assumption that the circle of subjective rights were narrower than that of other rights. This assumption is unfounded [...] In fact, whether subjective rights can be meaningfully distinguished from other types of rights, may be open to doubt. [...] "subjective right" appears to be used as a direct translation from other languages, in which the notion of "droit subjectif" or "subjektives Recht" is indeed very common. [...] These languages use the same expression (*droit*, *Recht*, etc.) in order to describe (i) the sum total of legal rules (i.e. "law"), and (ii) claim that enjoys legal protection ("right"). [...] where (as in the English language) the two mentioned above are expressed by entirely different words, such as "law" and "right", the attributes seem superfluous. (Tams 2005, 33)

Similarly, "There is no trace in the Anglo-American tradition [of describing] rights as being 'subjective' " (Campbell 2011).

## 12. Concluding Remark

It would seem that the tautological expression is not needed. The inquiry into its emergence has however, brought to view parts of a terminological/conceptual history which help elucidate features of current concepts of rights.

## Postscript

What has been said suggests that terminological novelties should be treated with circumspection. So, as a counterpart to Ockham's razor, we could also have the principle: "Avoid technical terms as far as possible."<sup>29</sup> It is easier to memorise if we give it a name, so let it be called Leibniz's razor.

<sup>29</sup> In Leibniz's words: "[Ostensum est] terminis technicis abstinendum esse, quoad eius fieri potest" (Leibniz 1990b, 418, line 6). Other statements that technical terms should be shunned also at p. 411, line 8 and p. 412, line 8. They are all in the prefatory dissertation to Nizolius 1670 (Leibniz 1990b). Leibniz himself seems to have thought of this principle as a counterpart to Ockham's razor, which he formulated *entia non esse multiplicanda praeter necessitatem* (ibid., 428). It is of interest to note that this form of words emerged in the seventeenth century, and is alluded to, e.g., in § 223 of Bayle's *Pensées diverses* (see Bayle 1683, 681). A remarkably informative account of the principle and why it came to be associated with Ockham comes from William M. Thorburn (1918, 345–53). His account makes it likely that Leibniz found the formulation in Clauberg's *Elementa philosophiae* (Groningen 1647) or in his *Logica vetus et nova* (Groningen 1654) or possibly in Poncius's (John Ponce) commentary of 1639 on Scotus's *Opus Oxoniense*.

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